IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7596 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VITRANG SILK MILLS PVT LTD
Versus
UNION OF INDIA

Appearance:
1. Special Civil Application No. 7596 of 2002
MR AMAR P DAVE for Petitioner No. 1-2
MR DN PATEL for Respondent No. 1
..... for Respondent No. 2-3

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 11/09/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

1 Rule. Service of rule is waived by Mr.D.N.Patel, Senior Central Government Standing Counsel for the respondents.

2 The petitioners have challenged the validity of the order dated 31/5/2002 bearing No.SRT/ADJ-24/2002/OA whereby penalty of Rs.4 lacs has been imposed. Looking to the course we are adopting for the purpose of disposal of this petition, we do not think it necessary to go into the facts of the case. It has been submitted by the learned Counsel that in matters involving similar facts, this court has remanded the matters to the Deputy Commissioner so that the issue with regard to imposition of penalty can be reconsidered. The judgment delivered by this Court in Special Civil Application No.1936 of 2002 dated 17.6.2002 has been relied upon by the learned Counsel appearing for the parties.

3 Clause (ii) of sub-rule (5) of Rule 96ZQ of the Central Excise Rules, 1944 (hereinafter referred to as 'the Rules') provides for imposition of penalty. However, in the body of the said clause, no guidelines are provided to impose penalty nor there is anything to indicate as to what should be the minimum or maximum amount of penalty. The contention raised on behalf of the Revenue is that as per the language used in clause (ii) of sub-rule (5), penalty is required to be imposed and therefore, whatever penalty is imposed by the assessing officer, should be treated as proper amount of penalty.

4 The Apex Court had an occasion to examine similar situation in the case of State of Madhya Pradesh V. Bharat Heavy Electricals reported in 1998(99) E.L.T.33 (SC). The main ground on which challenge to imposition of penalty in the said case was that the heavy levy of penalty of ten times the amount of tax was confiscatory in nature and was ultra vires the provisions of the Act and was also violative of Articles 14 and 19 of the Constitution. It was also contended that the presumption contained in sub-section (5) of Section 7 of the Act which was regarded as not being rebuttable, was ultra vires as it did not give any discretion to the assessing authority to reduce or waive the penalty on the ground of absence of malafide or on the ground of trivial or technical defect. In paragraph 10 of the judgment, the Apex Court pointed out as under :

"In our opinion, it could not be the intention of the legislature that an accidental omission or non-furnishing of the statement for a good and valid reason must necessarily lead to the presumption that the registered dealer had the intention of facilitating the evasion of entry tax ..."

5 Before us, the learned Counsel appearing for the Revenue has submitted that in view of the the words "he shall be liable to" contained in sub-rule 5 of Rule 96ZQ of the Rules, it must mean that the maximum penalty must be imposed as indicated in sub-clause (ii) of sub-rule 5 of Rule 96ZQ. It is required to be noted that in the case of State of Madhya Pradesh Vs. Bharat Heavy Electricals (supra), the Apex Court considered as to whether the words "shall be presumed" occurring in Section 28B were rebuttable or not. The Apex Court referred the decision rendered in the case of Sodhi Transport and Another etc. Vs. State of U.P. and Another etc. reported in (1986) 1 SCR 939, and observed, in relation to Section 4 of the Indian Evidence Act at page 953 as under :

"These words, i.e. 'shall presume' are being used in Indian Judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used and we should expect that the U.P.Legislature also has used them in the same sense in which Indian Courts have understood them over a long period and not as laying down a rule of conclusive proof. In fact these presumptions are not peculiar to the Indian Evidence Act. They are generally used whenever facts are to be ascertained by a judicial process".

6 In our view, there is no reason as to why the same analogy should not be applied in the instant case also. The Apex Court in the above decision has also pointed out that the Section should be read as containing a rebuttable presumption and clarifying the position, the Apex Court observed in paragraph-11 as under :

"This would mean that it will be open to the registered dealer to satisfy the authorities concerned that the non-submission of the statement under sub-sections (1) and (2) of Section 7 was not with the intention to facilitate the evasion of the entry tax. In

other words, sub-section (5) of Section 7 places the burden of proof on the registered dealer to show that the non-submission of the settlement under sub-sections (1) and (2) of Section 7 was not with a view to facilitate the evasion of entry tax."

7 The Apex Court pointed out that, "if the registered dealer is unable to satisfy the authorities in this regard then, in the absence of satisfaction, the presumption is that non-submission of statement has facilitated the evasion of entry tax". It is in view of this that the Apex Court held that the Section does not suffer from any vice and the Section is required to be construed to mean that the presumption contained therein is rebuttable and secondly, the penalty stipulated therein is only the maximum amount which would be levied and the assessing authority has the discretion to levy lesser amount depending upon the facts and circumstances of each case. Considering Section 7(5) in this manner, the Apex Court pointed out that the decision of the High Court that Section 7(5) is ultra vires cannot be sustained. Applying this analogy in the instant case also, it is difficult to accept the contention raised by the petitioner that the said Rule is ultra vires. However, at the same time the authority concerned is required to read the Rule in the manner indicated above.

8 In view of the above, respondent No.2, shall hear the matter afresh and pass appropriate order after considering the observation made by this Court and after hearing the petitioners.

9 In view of the above direction the petition stands disposed of. Rule made absolute accordingly with no order as to costs.

Sd/- Sd/-

(A.R.Dave, J) (D.A.Mehta, J)

m.m.bhatt